

*United States Court of Appeals
for the Second Circuit*



APPENDIX

76-1415

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

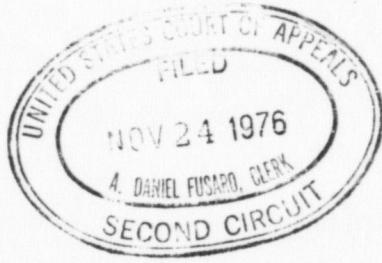
WALTER SWIDERSKI and
MARITZA DE LOS SANTOS,

Defendants-Appellants.

Bog S
Docket No. 76-1415

JOINT APPENDIX
TO APPELLANTS' BRIEFS

ON APPEAL FROM JUDGMENTS
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



JULIUS WASSERSTEIN, ESQ.,
LASHER & WASSERSTEIN,
Attorney for Appellant
MARITZA DE LOS SANTOS
26 Court Street
Brooklyn, New York 11242
(212) 237-1387

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
WALTER SWIDERSKI
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971
JONATHAN, J. SILBERMANN,
Of Counsel.

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CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

D. C. Form No. 109 Rev.

JUDGE BONSAL 75 CRIM. 797.

TITLE OF CASE		ATTORNEYS
THE UNITED STATES	vs.	For U.S.:
1. WALTER SWIDERSKI		Harry C. Batchelder, Sp. Atty. 791-0071
2. MARITZA DE LOS SANTOS		
		For Defendant 9/17

(07)	STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISE.
	J.S. 2 mailed	Clerk	12/1/75	42850	S -	
	J.S. 3 mailed	Marshal	12/1/75	Trice		
	Violation	Docket fee				
	Title 21					
	Sec. 812, 841(a)(1), (b). Distr. & possess. w/intent to distr. Cocaine, II & Marijuana, I.					
	(Two Counts)					

DATE	PROCEEDINGS
8-8-75	Filed indictment.
8-18-75	Deft. Swiderski (atty. present) Pleads not guilty. Bail fixed in the sum of \$1,500. P.R.E. continued. De Los Santos-Court directs entry of not guilty plea. Deft. R.O.R. Case assigned to Judge Bonsal for all purposes. Owen, J.
10-16-75	Filed Govt's Voir Dire.
10-20-75	Filed Govt.'s requests to charge.
10-21-75	Filed Govt.'s memo. of law re: entrapment.
10-21-75	Jury trial begun before Judge Bonsal.
10-22-75	Trial cont'd. Motion to dismiss re: deft. Los Santos-denied. Granted as to deft. Swiderski as to count 2-denied as to count 1.
10-23-75	Trial cont'd. and concluded. Deft. Swiderski guilty ct. 1. Deft. Los Santos guilty cts 1 & 2. Pre-sentence reports ordered. 12-8-75 set. for sent. Swiderski bail cont'd. Deft. Los Santos R.O.R.

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DATE	PROCEEDINGS
12-2-75	Filed Govt.'s memo. of law in opposition to counsel for Swiderski's trial memorandum.
2-08-75	WALTER SWIDERSKI (atty. present) Filed JUDGMENT - ct. 1-2 yrs. impr. pur. Sec. 3651 of T. 18, U.S. Code, as amended, with provision deft. be confined in a JAIL TYPE institution for a period of 6 mons. as provided in the aforesaid section. Execution of the remainder of the sentence is suspended and deft. is placed on probation for a period of 3 yrs., to commence upon expiration of confinement, subject to the standing probation order of this Court. Purs. to Sec. 841, of T. 21, U.S. Code, deft. is placed on Special Parole for a period of 3 yrs. to run concurrently with his prob. Bail pending appeal fixed in the amount of \$1,500. P.R.B. Bonsal, J. issued all copies.
2-08-75	MARITZA SWIDERSKI (atty. present) Filed JUDGMENT- ct. 1-2 yrs. impr. pur. Sec. 3651 of T. 18, U.S. Code, as amended, with provision deft. be confined in a JAIL type institution for a period of 6 mons. as provided in the aforesaid section. Execution of the remainder of the sentence is suspended and deft. is placed on probation for a period of 3 yrs. to commence upon expiration of confinement, subject to the standing probation order of this Court. Pursuant to Sec. 841 of T. 21 U.S. Code, deft. is placed on Special Parole for a period of 3 yrs. to run concurrently with her probation. Deft. cont'd. A.O.R. pending appeal. Bonsal, J. issued all copies.
12-10-75	W. Swiderski-filed P.R.B. (Unsecured) pending appeal in the sum of \$1,500.
2-12-75	W. Swiderski-filed notice of appeal from judgment of 12-8-75. Mailed copies to U.S. Atty & deft.
2-15-75	M. De Los Santos-filed notice of appeal from judgment of 12-8-75. Mailed copies to U.S. Atty. & Deft.
2-29-75	Filed notice that the record on appeal has been certified and transmitted to the U.S.C.A. 12-29-75.
1-12-76	M. Del Los Santos-filed CJA 20 approval for payment of fees of atty. Julius Wasserstein-26 Court St, Brooklyn, N.Y. tele: (212) 237-1387. Bonsal, J. issued all copies
2-26-76	Filed notice that the suppl. record on appeal has been certified and transmitted to the U.S.C.A.
4-06-76	Filed transcript of record of proceedings, dated 12-8-75.
6-07-76	W. Swiderski-filed documents forwarded by Magistrate Schreiber.
07-06-76	Filed true copy of order of the U.S.C.A. that the judgments of the District Court are reversed and the action is remanded to the District Court for further proceedings in accordance with the opinion of this Court. Clerk m/n (the convictions are reversed and a new trial is ordered)

XEROXED BY D. B. B. (D.B.B.)

DATE	PROCEEDINGS
07-20-76	Filed Govt's. request to charge on entrapment.
07-20-76	Jury trial begun before Judge Bonsal.
07-21-76	Trial cont'd.
07-22-76	Trial cont'd. and concluded. Jury verdict defts. guilty. Pre-sentence reports ordered. 9-13-76 set for sentence. Bail cont'd. Bonsal, J.
09-13-76	Filed Unsecured Personal Recognizance Bond \$1,500. pending appeal. (for deft. Swiderski)
09-13-76	M. Swiderski-(atty. Julius Wasserstein) Filed Judgment-Ct 1-2yrs. impr. 18:3651 SERVE 6 mos. remainder of sent. E.S.S. 3 yrs. prob. w/super. S.P. 3 yrs. 21:841. Deft. cont'd. R.O.R. pending appeal. Bonsal, J. issued all copies.
09-13-76	W. Swiderski-(atty. Jack Lipson) Filed Judgment- Ct. 1- 2 yrs. impr. 18:3651 SERVE 6 mons. remainder of sent. E.S.S. 3 yrs. prob. w/super. S.P. 21:841 3 yrs. Bail \$1,500. P.R.E. pending appeal. Bonsal, J. issued all copies.
09-16-76	W. Swiderski-Filed notice of appeal from judgment of 9-13-76. Leave to proceed in forma pauperis is granted. Bonsal, J. issued all copies: U.S. Atty. & deft.
09-17-76	M. Del Los Santos-filed notice of appeal from judgment of 9-13-76. Mailed copies: U.S. Atty & deft.

HCB,Jr.:bg

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 CRIM. 797

-----x
UNITED STATES OF AMERICA :

- v - :

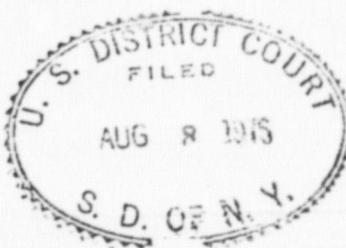
INDICTMENT

WALTER SWIDERSKI and
MARITZA DE LOS SANTOS,

75 Cr.

Defendants. :

AUG 8 1975



-----x
The Grand Jury charges:

On or about the 3rd day of June, 1975, in the
Southern District of New York, WALTER SWIDERSKI and MARITZA
DE LOS SANTOS, the defendants, unlawfully, intentionally and
knowingly did possess with intent to distribute, a Schedule
II narcotic drug controlled substance, to wit, 21.5 grams of
cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1)
and 841(b)(1)(A); Title 18, United States Code,
Section 2.)

SECOND COUNT

The Grand Jury further charges:

B
On or about the 3rd day of June, 1975, in the
Southern District of New York, WALTER SWIDERSKI and MARITZA
DE LOS SANTOS, the defendants, unlawfully, intentionally,
and knowingly did possess with intent to distribute, a
Schedule I narcotic drug controlled substance, to wit, 7.6
grams Marihuana (Cannabis sativa L.)

(Title 21, United States Code, Sections 812, 841(a)(1)
and 841(b)(1)(A); Title 18, United States Code,
Section 2.)

W. M. Dove
FOREMAN

Paul J. Curran
PAUL J. CURRAN
United States Attorney

MICROFILM

AUG 8 1975

United States District Court
SOUTHERN DISTRICT OF NEW YORK
THE UNITED STATES OF AMERICA

vs.

WALTER SWIDERSKI, and
MARITZA DE LOS SANTOS,

Defendants.

INDICTMENT

(21 USC §§ 812, 841(a)(1), 841(b)
(1)(A); Title 18 USC §2.)

PAUL J. CURRAN

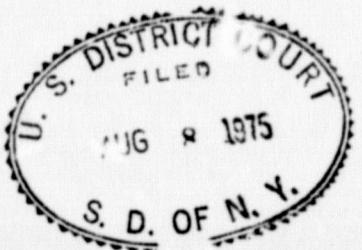
United States Attorney

A TRUE BILL

W.M. Down

Foreman.

FPI-SS-2-19-71-20M-6350



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PLAINTIFFS W/L T. MURKIN TO BONNIE J. PARKER
T. MURKIN 5/10/75

RE: WALTER SWIDERSKI AND MARITZA DE LOS SANTOS AND WALTER SWIDERSKI
FILED 5/10/75

JUDGE BONNIE J. PARKER AD

OCT 21 1975 JOINY ENPLANILLE GO TRIAL BEGUN
OCT 22 1975 TRIAL CONTD Both sides REST. ACTION
TO DISMISS RE: DEF'T LOSSANTUN DEF'N. GRANTED AS
TO DEF'T SWIDERSKI AS TO CTZ. DEF'N. CTZ. BONNIE J. PARKER

OCT 26 1975 BAIL BONITO, SUMM. TRIALS BY COUNSEL
CHARGE BY TYPE COURT. MARSHALS SWORN
JOINY YERICK DEF'T SWIDERSKI GUilty CTZ
DEF'T RE LOS SANTOS GO LTY CTZ FOR JOINY BEGUN.
PRE-SENTENCE REPORT DEC. 18/75 FOR SENTENCE
SWIDERSKI BAIL BONITO. LOS SANTOS R.O.A.

Q BONNIE J. PARKER
DEC 8 1975 SENTENCE TO WALTER SWIDERSKI ET/1
D/14. JACK LIPSON LEGAL 12/12 PRESENT
COMMUTED TO COSTODY OF 14. GEN TIP SEC 3651
IMPRISONMENT FOR 2 YR. TO SERVE 6 MOS. TIP
TYPE INSTITUTION EXECUTION OF BALANCE OF
SENTENCE SUSPENDED. PROBATION 3 YRS FOLLOWING
RELEASE T 21 S. 4208 1/14 SPECIAL PAROLE 3/2.
TO BE CONCERNED WITH PROBATION DATES OF
RIGHT TO PAPER, 1/14/15. SPARE DURING APPEAL.

BONNIE J. PARKER
MAY 8 1975 MARITZA DE LOS SANTOS AKA MARITZA
SWIDERSKI CONVICTION ON CTZ SENTENCE
SENTENCED ON CTZ TIP SEC. 3651

- Julius Wawrzewski (atty)
IMPRISONMENT 2 yrs. TO SERVE 6 mos. IN A JAIL TYPE INSTITUTION.
IMPRISONMENT 2 yrs. TO SERVE 6 mos. IN A JAIL TYPE INSTITUTION.
EXECUTION OF BALANCE OF SENTENCE SUSPENDED.
PROBATION 3 yrs. FOLLOWING RELEASE T-21 42884-A.
SPECIAL PAROLE 3 yrs. TO RUN CONCURRENTLY WITH PROBATION.
APPROVED OF RIGHT TO APPEAL. NOT PENDING APPEAL
BONSAI

JUL 20 1976 JURY EMPOWERED TO ALLEGED (Second trial)

JUL 21 1976 TRIAL CONT'D. BOTH SIDES REST BONSAI
MOVE TO DISMISS. MOTION DENIED. COUNSEL FOR DEFTS

BONSAI J.
SUMMARIZATIONS BY COUNSEL

JUL 22 1976 TRIAL CONT'D. CHARGE BY THE COURT
MARSHALS SWORN. JURY VERDICT DEFTS
GUILTY. PRESENTENCE REPORTS DATED
SEPT. 13, SET FOR SENTENCE BAIL CONT'D

BONSAI J.

SEP 13 1976 SENTENCE WALTER SOWDESKI (ATTY JACK LIPSON
PRESENT) 2 yr. CT. I. PURSUANT TO SEC. 3631 1/2 U.S. CODE
IS AMENDED. DEF'T. BE CONFINED IN A JAIL TYPE INSTITUTION
FOR A PERIOD OF 6 MONTHS. EXECUTION OF REMAINDER
OF SENTENCE SUSPENDED. DEF'T. PLACED ON
PROBATION FOR A PERIOD OF 3 yrs. COMMENCE UPON
EXPIRATION OF CONFINEMENT

8 T. 215841 PLEAED ON SPECIAL PLEA FOR A PERIOD OF
BY AS TO RUN CONCURRENTLY WITH PROBATION.
ADVISER TO RIGHT TO PLEA
REPS AIL PENDING REPEAL 1500 PERSONAL RECORDS
BONSAI J.

SENTENCE ALREADY SERVED BY SW. DERSKI INDICATED BY
MARIA DE LOSSADA (MAY 2018 WISCONSIN
PATENT) 2 yrs on C.I. T.I.P.S. 36057 U.S. CODE DISBILLED
DEFT. CONFINED IN JAIL TYPE INSTITUTION FOR A
PERIOD OF SIX MONTHS 6 MTHS EXECUTION OF
REMAINING SENTENCE SUSPENDED. PROBATION
T. 215841 TO COMMENCE UPON EXPIRATION
OF SPECIAL PERIOD FOR A PERIOD OF
THREE yrs. TO RUN CONCURRENTLY WITH PROBATION
ADVISER TO RIGHT TO PLEA
PONTINUED OWN RECOGNIZANCE PENDING APPROVAL
BONSAI J.

UNITED STATES OF AMERICA

v

75 Cr. 797

WALTER SWIDERSKI and MARITZA
DE LOS SANTOS

New York, July 22, 1976;
9:45 o'clock a.m.

Trial resumed.

8

(Jury in box.)

10 THE COURT: I wish to thank you for your
11 promptness in being here. I appreciate that.

12 THE CLERK: The Court will now charge the jury.
13 Spectators may leave at this time or remain seated until
14 the completion of the charge.

15 Will you lock the door, please, Marshal.

CHARGE OF THE COURT

18 THE COURT: Mr. Foreman, as you are, Mr. Curcio,
19 by virtue of occupying the first chair, and Ladies and
20 Gentlemen of the Jury:

21 I would like to join with the lawyers in thanking
22 each of you for the care and attention that you have shown
23 during this short trial and to tell you that I appreciate
24 the sacrifices that I know that each of you has had to
25 make in your own personal lives so you could serve in this

2 very important capacity of being on a federal jury.

3 I know you will bear with me and give me the
4 same attention that you have shown throughout the trial,
5 so that you may understand the principles of law which
6 apply to this case.

7 Remember I told you at the time you were
8 selected that it is the jury's duty to weigh the evidence
9 here calmly and dispassionately, without any sympathy or
10 without any prejudice for or against either the government
11 or either of these defendants. I told you that everyone
12 appearing before this bar of justice is entitled to a fair
13 and impartial trial, and this is regardless of his
14 occupation or his station in life. I told you when you
15 were selected that the subject matter here involved was
16 narcotic drugs and I told you that that fact must not
17 create any bias or prejudice in your minds, or prevent
18 you from rendering an absolutely fair and impartial
19 verdict. Of course, as I told you, your verdict must be
20 based solely on the testimony you heard from that witness
21 chair and on the exhibits which were received in evidence,
22 and on nothing else at all.

23 Then I told you, if you will recall, that you,
24 ladies and gentlemen, are the judges of the facts, that
25 at the end of the trial I would instruct you as to the law,

2 and that you must follow my instructions. It is not what
3 the lawyers say the law is or what you may have read in
4 another context, or even what you may have heard from
5 another judge; it is the instructions that I give you now.

6 Of course, as I said to you, you, the jury, are
7 the sole judges of the facts. It is not what a lawyer
8 may say a witness testified to or what he says the document
9 contains or shows, nor what I might say on these subjects.
10 It is what you, the jury, remember and decide.

11 I also told you when you were selected that you
12 would observe me having conversations with one or the
13 other of the lawyers during the trial. Indeed, I did.
14 I sustained objections and I overruled them. I told you
15 to pay no attention to all this, that this dealt with
16 matters of law and housekeeping and whatnot.

17 Above all, ladies and gentlemen, draw no
18 inferences from anything I may have said during this
19 trial which might lead you to believe that I favor one
20 side or the other here, because, of course, I do not.
21 That is not my prerogative; that is yours.

22 Now, throughout this charge, ladies and gentlemen,
23 I will instruct you that you may not convict either of
24 these defendants unless and until you were satisfied that
25 the government has proven each element comprising the

2 crime charged beyond a reasonable doubt.

3 What do we mean by beyond a reasonable doubt?

4 Well, the words, of course, do suggest the answer. It is
5 a doubt based on reason, a doubt which a reasonable man
6 or woman might entertain. But a reasonable doubt is not a
7 fanciful doubt, it is not an imagined doubt, it is not a
8 doubt that a juror might conjure up to avoid performing
9 an unpleasant task. It is a reasonable doubt; it is a
10 doubt which arises in a juror's mind because of something
11 in the evidence or the absence of evidence in the case; it
12 is the kind of doubt which would cause a reasonable man or
13 woman in a more serious and important matter in his or her
14 life to hesitate to act.

15 The burden is on the government to prove the
16 guilt of a defendant beyond a reasonable doubt. The
17 government need not prove a defendant's guilt beyond all
18 possible doubt, because, after all, if that were the rule,
19 few people, however guilty they might be, would ever be
20 convicted. In this world of ours it is practically
21 impossible for one to be absolutely and completely con-
22 vinced of any controverted fact which by its nature is not
23 susceptible to mathematical precision or to mathematical
24 certainty. So the law is that the government must prove
25 the guilt of a defendant beyond a reasonable doubt, not

2 beyond all possible doubt.

3 Now, when I review the indictment with you I
4 remind you, as I did when you were selected, the indictment
5 is merely the charge, the way the government brings into
6 court an individual who it claims has violated the law.
7 I told you that the indictment is not evidence of the guilt
8 of either of these defendants, nor does it detract from
9 the presumption of innocence with which the law surrounds
10 a defendant until his guilt is proved. This presumption
11 of innocence remains with each of these defendants through-
12 out the trial and applies to the consideration of each of
13 the essential elements of the crimes charged. This
14 presumption of innocence remains unless and until the
15 jury should find that the government has proved the guilt
16 of the defendant beyond a reasonable doubt

17 There are two defendants here, as you know,
18 Mr. Swiderski and Miss De Los Santos. The charge here is
19 as to these two individuals, and the guilt of each of them
20 must be passed upon by you separately. Guilt or innocence
21 is a personal thing, and each of these defendants has the
22 right to the same consideration on your part as if he or
23 she were being tried alone.

24 Now, ladies and gentlemen, this has been a short
25 trial. The lawyers summed up to you in considerable

2 detail, and I am not going to review all the evidence
3 again with you, because, after all, as I told you, it is
4 your recollection, not mine, that controls. I also told
5 you that what the lawyers say or what I say on these things
6 is not evidence.

7 It may help a little bit if I mention what I
8 understand to be the contentions of the parties here. I
9 will do that only for the purpose of perhaps helping you
10 refresh your recollection, which, after all, controls.

11 The government here is contending that on June
12 3, 1975, the defendants, Mr. Swiderski and Miss De Los
13 Santos, each possessed with intent to distribute 21.5 grams
14 of cocaine. As I recall it, the government contends
15 that Mr. Swiderski was in contact with a paid government
16 informant, Charles Davis, on or about May 31, 1975, that
17 Davis arranged for Mr. Swiderski to meet a fellow named
18 Carlton Bush and Gene Casey, that they were to sell the
19 cocaine to Swiderski. Then on June 3, 1975, Swiderski
20 and Miss De Los Santos met with Davis and met with
21 Carlton Bush and this fellow Casey somewhere on West 48th
22 Street, and that is where the government contends the
23 purchase of the cocaine was made.

24 As I recall it, the government is also contending
25 here that the evidence shows that the defendants tested

2 and snorted the cocaine, and then arrangements were made
3 for the purchase of an ounce, I think, for \$1,250, and
4 there was some evidence they were going to meet Gene at
5 6 o'clock that afternoon to arrange for the purchase of
6 an additional three ounces.

7 Then after the meeting, as I recall it, the
8 government is contending that the defendants returned, took
9 Davis back to the hotel, the Hotel Chelsea, and while they
10 were in the van and driving up Eighth Avenue towards
11 34th Street and making a righthand turn, that is when the
12 policemen said they intercepted them and where the arrest
13 was made, and at the time of the arrest the cocaine was
14 found in the pocketbook, in a bag belonging to Miss De Los
15 Santos.

16 Each of the defendants denies the government's
17 contentions. The defendant Swiderski says that in connec-
18 tion with the transaction on June 3, 1975, that he was
19 entrapped into making the purchase by the activity of
20 Davis, the government informant, and denies that he had
21 any intention of distributing the cocaine. And, of course,
22 Miss De Los Santos also denies the government's contentions.
23 She contends that she just went along and didn't know what
24 was going on, that she had some money because she wanted
25 to make some purchases at the Boutique Show. I think they

2 testified something about sniffing the cocaine, but she
3 says that she had nothing to do with any purchase of
4 cocaine by her.

5 Now, the statute involved here, ladies and
6 gentlemen, is Section 841(a)(1) of Title 21 of the United
7 States Code, which provides to the extent here relevant
8 that it shall be unlawful for any person knowingly or
9 intentionally to possess with intent to distribute a
10 controlled substance.

11 You may ask me, "What is a controlled substance
12 as used in the statute?" You remember the government
13 chemist testified the substance here was cocaine, and if
14 you find that the substance involved here was cocaine,
15 then that is a controlled substance as used in the statute
16 I just reviewed with you.

17 Then the indictment -- I repeat the indictment
18 is merely a charge -- reads:

19 "The grand jury charges:

20 "On or about the third day of June, 1975, in
21 the Southern District of New York Walter Swiderski
22 and Maritza De Los Santos, the defendants, unlawfully,
23 intentionally and knowingly did possess with intent
24 to distribute a Schedule II narcotic drug controlled
25 substance, to wit, 21.5 grams of cocaine hydrochloride."

2 I think you will recall that in this connection
3 the chemist testified that Exhibit 1 contained cocaine
4 hydrochloride, and it was 19.2 per cent in purity. So
5 you can see, ladies and gentlemen, from the indictment
6 that the government here is contending that the defendants
7 Swiderski and Miss De Los Santos unlawfully, knowingly
8 and intentionally possessed the cocaine on June 3 with the
9 intention of distributing.

10 You will recall that the statute speaks about
11 possession with intent to distribute. What is possession?
12 There are two types of possession: One is called actual
13 possession and the other constructive possession. Actual
14 possession means if you have something in your hand or
15 something in your pocket or if you have something in your
16 purse, or if you have something in your apartment. That
17 would be actual possession. Constructive possession means
18 you may not have the article in your hand, but you have
19 control of it. You may have given it to somebody
20 for safekeeping, but you know where it is and you have
21 control over the item.

22 Now, turning to what "possession with intent to
23 distribute" means, well, intent to distribute merely means
24 that you intend at some point or later time to pass on
25 all or some of it; it means you intend to sell it; it

3x

2 means you intend to give it away; you can intend to give
3 it to a friend of yours or somebody who is close to you.
4 If you are going to pass it on, that is to distribute under
5 the statute.

6 Turning back to the indictment, ladies and
7 gentlemen, in order to convict these defendants--and I
8 remind you you must consider each of the defendants
9 separately and the evidence with respect to each defendant
10 separately -- in order to convict the defendant you are
11 considering, the government must prove the following three
12 elements:

13 First, that the defendant you are considering
14 possessed the cocaine with intent to distribute it. I
15 have covered possession and distribution with you. That
16 is the first element.

17 Second, that the defendant you are considering
18 was acting wilfully, knowingly and unlawfully. That means --
19 and I will talk to you more about it later -- that the
20 defendant you are considering knew what he or she was
21 doing, knew that he or she was in possession of the
22 narcotic and was intending to distribute it, and

23 Third, that the substance involved was cocaine.

24 Here you recall the chemist's testimony, and I
25 do not recall that there is any contradiction on that in

2 the evidence. As I recall, the government's contention
3 here is with respect to the transaction on June 3rd --
4 this is based on Davis' testimony -- that the package
5 containing the cocaine was handed to Swiderski and that
6 he placed it in his pants pocket. The defendants denied
7 that contention. I think they testified that somebody
8 had placed the package in Miss De Los Santos' pocketbook.

9 Now, of course, there is not any dispute that
10 the package, whether it reached Mr. Swiderski or Miss De
11 Los Santos, was in the van at the time that the defendants
12 were arrested on 34th Street and Eighth Avenue.

13 Miss De Los Santos is contending she had nothing
14 at all to do with this, that she was just there. And as
15 I recall the testimony, the prior negotiations, according
16 to Mr. Davis, were carried on by Mr. Swiderski. Well,
17 here the government is contending that Miss De Los Santos
18 aided and abetted Swiderski in effecting the purchase of
19 the cocaine. This brings into play another statute,
20 Section 2 of Title 18 of the United States Code, which
21 provides in relevant part that whoever commits an offense
22 against the United States, or aids, abets, counsels,
23 commands, induces or procures its commission is punishable
24 as a principal. All that means is that if one helps some-
25 body else to commit a crime, that person is equally liable

2 as an aider and abettor in that crime, and the government
3 here contends that the evidence shows that at the apartment
4 on 48th Street Miss De Los Santos did aid and abet Mr.
5 Swiderski in purchasing the cocaine.

6 But here, before you can find Miss De Los Santos
7 guilty of aiding and abetting, the government must prove
8 beyond a reasonable doubt that she knowingly aided,
9 abetted and assisted Swiderski in purchasing the cocaine,
10 that she knowingly did so, that she knowingly assisted
11 Swiderski in purchasing the cocaine. It is immaterial that
12 they were in ~~in~~ces, and it is not enough that Miss De Los
13 Santos may have ~~in~~quiesced in sufficient to find that she
14 was aiding and abetting Swiderski. Here to find Miss
15 De Los Santos guilty you must find that she knowingly and
16 willingly participated in the transaction, that she
17 sought in some way by her participation to have it come about,
18 that she had an interest in its outcome, which could
19 be financial or any other kind of interest. Here you will
20 recall the evidence about where the money came from to pay for
21 the package, that there were certain tests made, something

22

23

24

25

2 about a bleach test. So consider the evidence here and
3 determine whether the government has proved beyond a
4 reasonable doubt that Miss De Los Santos aided and abetted
5 Swiderski in the purchase of the cocaine.

6 Each of these defendants contend that they
7 were entrapped into making this purchase by the activity
8 of Davis, the paid government informant. Here again you
9 must consider each defendant separately.

10 What is entrapment? Entrapment is a defense
11 available to a defendant who is induced or enticed to
12 commit a crime that he or she otherwise would not have
13 committed if it were not for the activity of the government
14 informant, here Davis. A basic feature of entrapment is
15 that the idea of committing the crime originated with the
16 government informer, Davis, rather than with the
17 defendant you are considering, that the defendant you
18 are considering had no previous disposition, intent or
19 purpose to commit the alleged crime, and that Davis
20 instigated or initiated its commission in order that the
21 defendant might be arrested and prosecuted.

22 Now, of course, to a certain extent, the
23 narcotics business is one which is filled with concealment
24 and guile, and to apprehend violators under the narcotics
25 laws, the government must employ various strategems,

2 including the use of paid informers and undercover agents.
3 You can understand that if policemen went out with their
4 badges and uniforms on and said, "We are looking for
5 narcotics violators," they would probably not catch anybody.

4 x 6 So in considering whether there is entrapment
7 here, please consider all the evidence offered by the
8 government and by the defendants. You may consider any
9 evidence relating to statements by the defendant you are
10 considering as to the price and quality of the cocaine,
11 the time of delivery, willingness to make future purchases
12 and similar matters. When you have done this, consider
13 whether that defendant has presented evidence indicating
14 that he or she was enticed and induced by the government
15 informer, Davis, to participate in the cocaine transaction
16 on June 3. If you find that the defendant you are
17 considering has presented such evidence of initiation
18 or inducement, then the government, in addition to the
19 other elements of the crime which I have reviewed with you,
20 has the burden of proving beyond a reasonable doubt that
21 the defendant you are considering had the predisposition
22 and was ready and willing to commit the crime on June 3
23 and that Davis merely afforded him or her the opportunity
24 to do so.

25 If you find, following this review of the evidence,

2 that the defendant you are considering was enticed or
3 induced to purchase the cocaine on June 3 by Davis and if
4 you find that the government has not proven beyond a
5 reasonable doubt that the defendant was ready and willing
6 to purchase the cocaine or to aid and abet the other
7 defendant in the purchase, then you would find the defendants
8 not guilty.

9 On the other hand, if you find that the government
10 has proven beyond a reasonable doubt that the defendant you
11 are considering knowingly and wilfully purchased or aided
12 and abetted in the purchase, and that all that Davis did
13 was to afford the defendant an opportunity to do so, then
14 you would find the defendant guilty, if the government
15 has proven beyond a reasonable doubt the other elements
16 of the crime that I have reviewed with you.

17

18 Now, from this, ladies and gentlemen, you will
19 see that one of the crucial elements here is the knowledge
20 and intent of the defendant you are considering. You
21 must find that the defendant you are considering had
22 criminal intent to violate the narcotics laws by possessing
23 the cocaine with intent to distribute it.

24 Well, how do you determine that? How do you
25 determine whether the defendant was acting wilfully,

2 knowingly, unlawfully, and, indeed, had this criminal
3 intent?

4 Well, an act is done knowingly and wilfully if it
5 is done voluntarily and purposefully. An act is done
6 wilfully, knowingly and unlawfully if it is done with an
7 evil motive or purpose, such as to violate the narcotics
8 laws. But an act is not done wilfully, knowingly or
9 unlawfully if it is done by mistake, carelessness or
10 other innocent reason. Obviously, it is impossible to
11 prove exactly what the defendant you are considering knew
12 or what his or her intentions were on these occasions,
13 because, after all, we can't look into a person's mind
14 and see what knowledge he or she had in order to determine
15 his or her specific intention. But these are matters
16 which you, the jury, can determine after a careful con-
17 sideration of the facts and circumstances brought out in
18 the evidence.

19 The knowledge and intentions, the wilfulness,
20 if you will, may only be understood when put in context
21 with the circumstances surrounding a person's acts and the
22 inferences which you, the jury, find may be reasonably
23 drawn therefrom. You might ask yourself whether these
24 transactions were normal or whether you think they were
25 abnormal, whether they were open or whether they were

2 surreptitious, whether you believe that the background
3 of the defendant made it likely or unlikely that he or she
4 fully understood what he or she was doing, whether you
5 think the defendant had a motive, whether he or she had a
6 financial or other interest in the outcome. These are
7 the kind of questions, ladies and gentlemen, of course,
8 not the only ones, which you should ask yourselves in
9 order to determine the knowledge and intentions of the
10 defendant you are considering. And I don't suggest any
11 answers to these questions, because, after all, in your
12 own daily lives you are called upon to use your own common
13 sense and experience to determine from the actions or
14 statements of others what their real intentions and pur-
15 poses are, and please do that here with respect to each
16 of these defendants

17 In this connection, as I recall it, there was
18 testimony by Mr. Davis that he had had prior conversations
19 with the defendant Swiderski regarding narcotics transac-
20 tions. Now, here he is being charged only with the
21 purchase on June 3rd, 1975. These conversations, as I
22 recall it, occurred before June 3rd. This evidence of
23 prior conversations, therefore, should be considered by
24 you only in determining what Swiderski's knowledge and
25 intentions were on June 3, when the government contends

2 the purchase of the cocaine was made.

3 There is another point here. You remember there
4 was some testimony by the police officers that when they
5 apprehended the defendants on the corner of 34th Street
6 and Eighth Avenue, that the van being driven by Mr.
7 Swiderski went forward and backward trying to get away.
8 You remember that testimony. Mr. Swiderski denies
9 that this indicates he was trying to flee, which is what
10 the government has contended here. Mr. Swiderski contends
11 that when he saw these two men on the corner there, each
12 with a gun, it frightened him, because he thought it might
13 be a holdup or something, that he was frightened and was
14 trying to get away. So consider this evidence, ladies
15 and gentlemen, and if you find that Mr. Swiderski was
16 trying to escape the police on that occasion, then you may
17 consider that as circumstantial evidence from which you
18 may infer, but don't have to, that the defendant, Mr.
19 Swiderski, knew that he had violated the law and was trying
20 to get away, in other words, it is evidence of
21 consciousness of guilt. But, of course, this evidence
22 regarding the banging of the cars may be considered only
23 with respect to Mr. Swiderski, who was driving the van.
24 Do not consider it with respect to the other defendant, Miss
25 De Los Santos, who was a passenger in the van at the time.

2 The law recognizes two types of evidence, direct
3 and circumstantial. Direct evidence is the testimony of
4 a witness who testifies as to what he observed and what
5 he did. Circumstantial evidence consists of circumstances
6 from which the jury may infer by a process of reasoning
7 certain facts which are sought to be established as true.

5 x

8 I think the classic example of circumstantial
9 evidence is when you go home one afternoon to your apart-
10 ment and somebody is watching the television in your
11 apartment, and they look at you and they see your coat
12 and hat are wet, or your coat is wet, and they say to
13 you, "Gee, it's raining outside." They have not looked
14 outside; they looked at you. The circumstances of your
15 wet hat and coat by process of reasoning leads them to say
16 it is raining outside. That is circumstantial evidence.
17 And, of course, there is circumstantial evidence in this
18 case.

19 Both direct and circumstantial evidence are
20 good evidence, and no greater degree of weight is required
21 whether it is circumstantial or direct. But, in any event,
22 based on all the evidence, you must be convinced beyond a
23 reasonable doubt of the guilt of the defendant you are
24 considering beyond a reasonable doubt.

25 Different inferences may be drawn from the

2 evidence, whether it is direct or circumstantial. The
3 government may ask you to draw one set of inferences,
4 but it is for you, the jury, alone to determine what
5 inferences you draw from the evidence and what facts you
6 find to have been proved. You, the jury, of course, are
7 the exclusive judges of the credibility of the several
8 witnesses who appeared before you. I know you gave them
9 careful attention. Subject the testimony of all these
10 witnesses to the same standards, whether they were called
11 by the government or called by the defendants, whether
12 they happen to be policemen or government agents or some-
13 body else.

14 Of course, it is not the quantity of the testi-
15 mony, but the quality of the testimony that you are to
16 consider; it is the testimony that you think represents the
17 true picture of what happened on this occasion.

18 How do you determine the credibility of these
19 witnesses? Well, you observed them, you saw them. Did
20 you think they were testifying frankly and candidly and
21 clearly? Here again apply your common sense and
22 experience, just as you do in determining an important
23 matter in your own lives when you are called upon to decide
24 something, whether you have been given a true picture of a
25 given situation. You will consider a witness' demeanor,

2 or you will take into account the witness' background, his
3 occupation or his business, consider a witness' candor
4 or lack of it, a witness' possible bias, his or her
5 means of information, and the accuracy of the witness'
6 recollection. You will regard whether you think a
7 witness' testimony is supported or whether you find it
8 contradicted by other testimony which you find to be
9 credible. You will consider whether a witness has an
10 interest in the case.

11 Now, as I remember it here, two New York City
12 policemen testified. They are law enforcement agents.
13 They have an interest, I suppose. Their interest is to
14 see that people are prosecuted whom they think have
15 violated the law. Well, that is an interest that you can
16 consider.

17 Here each of the defendants testified. They have
18 quite an interest in this. They testified voluntarily.
19 They didn't have to. But they certainly have an import-
20 ant interest here, and that is something you should consider
21 in determining the credibility of their testimony.

22 Of course, this does not mean that a witness will
23 falsely testify to you or shade his testimony because that
24 witness has an interest, but it is a fact for you, the
25 jury, to determine in assessing that witness' credibility.

2 I would like to add a word about Mr. Davis. You
3 recall that he told us he was a government informant and
4 he testified that he had been doing this for some time,
5 and, as I recall it, had received payments -- I think you
6 remember the figure -- \$16,000. And I think there was
7 some testimony that he got paid by the number of cases he
8 brought; the more cases, the more pay. So you must
9 consider his testimony with extreme care, because he,
10 obviously, has a particular interest here. If you find
11 that Davis' testimony is not corroborated by other testi-
12 money, then his testimony should be given such value and
13 weight as you deem proper under the circumstances. His
14 testimony is sufficient to convict the defendants here if
15 you believe it and it convinces you of the guilt of the
16 defendant you are considering beyond a reasonable doubt.
17 But you should bear in mind any motive you think Davis
18 had in testifying for the government and you should subject
19 his testimony to close and searching scrutiny.

20 A witness may be discredited if you find that he
21 made statements at other times which are inconsistent with
22 his present testimony. Of course, if you find a witness
23 has lied to you or was misleading you, you can reject all
24 of the testimony of that witness if you want, or, if you
25 find part of it reliable you can accept that part of it and

2 reject the rest.

3 You will have the right to see any of the
4 exhibits which have been received in evidence during the
5 trial. If you want to see them, just let me know by
6 telling the marshal.

7 As you deliberate, ladies and gentlemen, just
8 remember that a jury deliberation is one in which everybody
9 expresses their views and exchanges views. Please don't
10 be afraid to change your original view if after talking
11 to your fellow jurors you become convinced that your
12 original view is wrong. On the other hand, ladies and
13 gentlemen, never surrender your honest conviction in the
14 case; never surrender that because you are outvoted, or
15 for any other reason at all. Stay with your conscientious
16 conviction.

17 You will seek to arrive at a verdict here provid-
18 ing that you can do so consistently with the conscientious
19 convictions of each and every one of you.

20 It is obviously extremely important here to both
21 the government and to each of the defendants that this case
22 be decided by you. This being a criminal case, your
23 verdict must be a unanimous verdict, a verdict reflecting
24 the conscientious conviction of all twelve of you.

25 If after reviewing the evidence, ladies and

2 gentlemen, you find that the defendant you are considering
3 is not guilty, you must not hesitate for any reason to
4 return a verdict of not guilty, but if on the other hand
5 you find that the law has been violated by the defendant
6 you are considering, you must not hesitate to render a
7 verdict of guilty because of sympathy or any other reason
8 at all.

9 Please don't consider the possibility of punishment
10 in case you find a defendant guilty. This rests with
11 the Court. It is of no concern of yours and must not
12 enter into your deliberations in any way. You must not
13 allow consideration of the possibility of punishment to
14 affect you or make you seek to avoid the performance of
15 an unpleasant task.

16 Finally, ladies and gentlemen, I am sure that if
17 you listen to the views of your fellow jurors and if you
18 apply your common sense, that you will reach a fair verdict,
19 and I remind you that that verdict must be rendered without
20 fear, without favor, without prejudice and without sympathy.

21 I mention to you that you will reach a separate
22 verdict as to each defendant, Mr. Swiderski and Miss De
23 Los Santos. Your verdict as to the defendant should
24 be either guilty or not guilty.

25 Come forward, counsel.

2 (At the sidebar.)

3 MR. BATCHELDER: Nothing, your Honor.

4 MR. LIPSON: Would your Honor deem the requests
5 to charge submitted at the first trial as submitted in this
6 case?

7 THE COURT: No. There were no requests to charge
8 submitted to me here and you have not asked them until now.

9 MR. LIPSON: I had submitted the request on
10 entrapment at the first trial.

11 THE COURT: You have an exception to the charge
12 on entrapment.

13 MR. LIPSON: That is the only charge I am refer-
14 ring to.

15 I will object to the manner in which the evidence
16 was marshalled.

17 I respectfully would except to one thing. Your
18 Honor in discussing the alleged prior conversations between
19 Martin Davis and Swiderski presented Mr. Davis' version
20 of those conversations, and nothing was presented of Mr.
21 Swiderski's version of those meetings.

22 Finally, at the end of the Court's charge the
23 Court said if you find that the defendants are not guilty
24 do not hesitate to acquit them. I think it would have been
25 more proper to say that if you find that the government has

2 failed to prove their guilt beyond a reasonable doubt,
3 don't hesitate to acquit them.

4 MR. WASSERSTEIN: I would join in my
5 colleague's exceptions, and this is something that I don't
6 know if I will be able to articulate.

7 With respect to the aiding and abetting, you made
8 some remark with respect to if you find the intention was to
9 pass it on to a friend.

10 THE COURT: I was talking about distribution.

11 MR. WASSERSTEIN: My problem with aiding and
12 abetting deals with distribution. I don't think you made
13 enough of a distinction between what is necessary to be an
14 aider and an abettor with respect to mere possession without
15 distribution.

16 THE COURT: I think really the aiding and abetting
17 is with regard to the transaction on June 3rd, and which
18 the government contends Swiderski bought with intention to
19 distribute, and Miss De Los Santos aided and abetted him.

20 MR. BATCHELDER: That is correct.

21 THE COURT: You have an exception.

22 MR. WASSERSTEIN: When this is tied to the
23 government's statement on summation that perhaps they
24 intended to bring it home and distribute it and in view of
25 the fact that it was in my client's handbag and that when

2 she got it home she might have used it, and once she uses
3 it, she is distributing it to herself --

4 THE COURT: Well, I told them what I thought dis-
5 tribution meant.

6 You both have your exceptions. Thank you very
7 much, gentlemen.

8 (In open court.)

9 THE COURT: Mr. Rosenblatt and Mr. Cromwell, you
10 lasted right up to the end and your fellow jurors are all
11 right. So it is my duty to excuse you now. I want to
12 thank you for being with us during this trial. You can see
13 how desperate we would have been if you had not been here
14 and one of the other jurors was unable to continue. I want
15 to thank you. I hope you have found this a good
16 experience.

17 THE CLERK: You will report back, please, to the
18 central jury part on the first floor.

19 (Alternate jurors excused.)

20 (Marshals sworn.)

21 THE COURT: Thank you, ladies and gentlemen. You
22 may now retire and commence your deliberations.

23 (At 10:25 a.m. the jury retired to commence its
24 deliberations.)

25 (At 10:55 a.m. the following took place in the

2 robing room.)

3 THE COURT: Gentlemen, I received two notes from
4 the jury. The first one is:5 Group of exhibits. The jury would like to see
6 the following evidence and all exhibits:

7 Boutique letter.

8 Have you got that?

9 MR. BATCHELDER: Yes.

10 THE COURT: Boutique directory.

11 MR. BATCHELDER: Yes.

12 THE COURT: Exhibit from the examination before
13 trial. I don't know what they mean by that.14 MR. BATCHELDER: I think what they are talking
15 about is the examination of Mt. Swiderski that he had dealt
16 with Abacus or Dante.17 MR. LIPSON: I am not sure we have reached that
18 conclusion.19 MR. WASSERSTEIN: I would think it refers to the
20 use of the prior inconsistent testimony of Marty Davis.21 THE COURT: The next is money or list of
22 denominations of the bills.

23 MR. BATCHELDER: We have the money.

24 THE COURT: Then the other note, the jury would
25 like a statement of the charges against each defendant.

2 MR. BATCHELDER: It is contained in government's
3 request number 3.

4 THE COURT: I will send them the indictment. Have
5 you got another copy of this? Isn't that the thing? I will
6 tell them it is the charge and I will remind them about the
7 aiding and abetting.

8 (Proceedings continued in the courtroom with
9 the jury in the box.)

10 THE COURT: We received your two notes. The
11 first one reads:

12 "The jury would like to see the following evidence
13 and/or exhibits:

14 "Boutique letter."

15 I understand that is Defendant Swiderski's Exhibit
16 D, and that will be sent in to you.

17 The Boutique directory.

18 That is Government's Exhibit 14 and that will be
19 sent in to you.

20 We are not clear as to what you mean by the next
21 one: Exhibit from the examination before trial.

22 THE FOREMAN: There were various typed papers
23 that were brought into evidence. I am not sure either by
24 the testimony.

25 THE COURT: I don't think those are in evidence.

2 You mean those pages that were shown to the witness? They
3 are not in evidence. They were just shown to him to
4 refresh his recollection. His testimony is the evidence.

5 And, finally, the money or list of denominations
6 of the bills.

7 We will send you in the exhibits. Those are
8 Exhibits 3 and 4. And so much for the note.

9 Now, the second note reads: "The jury would
10 like the statement of the charges against each defendant."

11 I read you the indictment and I will send the
12 indictment in to you. Remember, when that is done, it is
13 purely the charge, it is not evidence. It is a statement
14 of the charges. And, secondly, you recall I told you during
15 my charge that, in effect, the government is contending here
16 that Maritza De Los Santos aided and abetted. That is
17 cited in one of those numbers. The charge against her is
18 aiding and abetting in the crime. You will understand
19 that. With that, we will send those in to you.

20 THE FOREMAN: Your Honor, could we also have the
21 box?

22 THE COURT: The alleged money case?

23 MR. BATCHELDER: Your Honor, that is Government's
24 Exhibit 2.

25 THE COURT: Yes.

2 (The jury retired to continue its deliberations.)

3 (From 12:30 p.m. to 1:45 p.m. the jury had its
4 lunch.)

5 (At 1:50 p.m. the following took place in the
6 robing room):

7 THE COURT: I received a note from the jury.

8 The jury would like (a) definition of entrap-
9 ment.

10 (b) Definition of intent to distribute.

11 (c) Clarification of the following:

12 If both defendants possessed the drug

13 (i.e., one paid for it and it was found in the other's
14 handbag) can "intent to distribute" mean one giving
15 the drug to the other or must third parties be involved?

16 (d) Could we get some cigarettes?"

17 And then, "Please clarify the charges against
18 Maritza De Los Santos."

19 I will give them a definition of intent to dis-
20 tribute and I will give them a definition of entrapment,
21 and I will read the aiding and abetting charge.

22 MR. BATCHELDER: We talked with the alternates
23 outside and they indicated they were somewhat confused as
24 to whether if it was from one person to another it could be
25 possession with intent to distribute, and, indeed, it can

2 be, and the charge itself is rather a unique situation,
3 it is a husband and wife situation, two people extremely
4 close, so the transfer of the drugs from one to the
5 other is sufficient, and I think the government would
6 request that the Court do that. The jury has specifically
7 requested and we believe the Court can answer that ques-
8 tion.

9 MR. LIPSON: I would disagree. The government's
10 theory in this case was that they were acting in concert,
11 and I don't think a distribution from one to the other
12 can constitute distribution for the purposes of deciding
13 whether they had the intent to distribute.

14 MR. BATCHELDER: That is nonsense.

15 THE COURT: I am going to give them the intent to
16 distribute charge. I think I covered that pretty care-
17 fully.

18 MR. BATCHELDER: That was the point that the
19 jurors made at the end of the charge: they did not under-
20 stand possession with intent to distribute as it was
21 charged, that the transfer of the drugs from one to the
22 other is sufficient to satisfy that.

23 Mr. Lipson's argument that they were acting in
24 concert as a legal proposition is sheer nonsense.
25 Obviously, if it was transferred from one person to another,

2 that is sufficient.

3 THE COURT: I am going to do what I said I am
4 going to do, and if you don't like the charge when I give
5 it, you can except.

6 MR. LIPSON: As to Miss De Los Santos, the
7 government charged on the theory that she was an aider and
8 abettor, that she assisted Walter Swiderski in getting
9 these drugs. If she was only an aider and abettor, how
10 does she come to be charged with an intent to distribute?

11 MR. BATCHELDER: She ends up with 21 grams,
12 more drugs than she ordinarily would have.

13 MR. LIPSON: I think under the government's
14 theory any two people charged with possessing drugs, the
15 government can then argue there is an intent to distribute.

16 MR. BATCHELDER: That is ridiculous.

17 THE COURT: I appreciate all the views, but I
18 know what I am going to do, and if anybody wants to take
19 an exception they can.

20 MR. BATCHELDER: What are you going to tell them
21 with respect to that issue?

22 THE COURT: I am going to charge them as I did
23 before.

24 MR. LIPSON: Is your Honor going to read the
25 entire entrapment charge?

2 THE COURT: Yes.

3 MR. BATCHELDER: Are you going to read the aiding
4 and abetting charge?

5 THE COURT: Yes.

6 MR. WASSERSTEIN: I don't think they asked for
7 the aiding and abetting charge.

8 THE COURT: Yes, that is the second note, "Please
9 clarify the charge against Maritza De Los Santos." They
10 asked for that.

11 (The proceedings continued in the courtroom
12 with the jury in the box.)

13 THE COURT: Ladies and gentlemen of the jury, I
14 received two notes from you. The first of them reads:

15 The jury would like (a) definition of entrap-
16 ment.

17 Now, on that I take it you would like me to read
18 what I told you in the charge on entrapment. I told you
19 that the defendants each contend that they were entrapped
20 into making this purchase by the activity of Davis, the paid
21 government informant. Here again you must consider each
22 defendant separately.

23 Now, what is entrapment? Entrapment is a defense
24 available to a defendant who is induced or enticed to commit
25 a crime that he or she otherwise would not have committed

2 if it were not for the activity of the government informant,
3 here Davis. A basic feature of entrapment is that the idea
4 of committing the crime originated with the government
5 informer, Davis, rather than with the defendant you are
6 considering, that the defendant you are considering had
7 no previous disposition, intent or purpose to commit the
8 alleged crime, and that Davis instigated or initiated its
9 commission in order that the defendant might be arrested
10 and prosecuted.

11 Now, of course, to a certain extent, the narcotics
12 business is one which is filled with concealment and guile,
13 and to apprehend violators under the narcotics laws, the
14 government must employ various strategems, including the
15 use of paid informers and undercover agents. You can
16 understand that if policemen went out with their badges
17 and uniforms on and said, "We are looking for narcotics
18 violators," they would probably not catch anybody.

19 So in considering whether there is entrapment
20 here, please consider all the evidence offered by the
21 government and by the defendants. You may consider any
22 evidence relating to statements by the defendants you
23 are considering as to the price and quality of the cocaine,
24 the time of delivery, the willingness to make future pur-
25 chases, and similar matters. When you have done this,

2 consider whether that defendant has presented evidence
3 indicating that he or she was enticed and induced by the
4 government informer Davis to participate in the cocaine
5 transaction on June 3. If you find that the defendant
6 you are considering has presented such evidence of
7 initiation or inducement, then the government, in addition
8 to the other elements of the crime which I have reviewed
9 with you, has the burden of proving beyond a reasonable
10 doubt that the defendant you are considering had the pre-
11 disposition, was ready and willing to commit the crime on
12 June 3, and that Davis merely afforded him or her the
13 opportunity to do so.

14 If you find, following this review of the
15 evidence, that the defendant you are considering was
16 enticed or induced to purchase the cocaine on June 3, and
17 if you find that the government has not proven beyond a
18 reasonable doubt that the defendant was ready and willing
19 to purchase the cocaine or to aid and abet the other
20 defendant in its purchase, then you will find that
21 defendant not guilty.

22 On the other hand, if you find that the government
23 has proven beyond a reasonable doubt that the defendant
24 you are considering knowingly and wilfully purchased or
25 aided and abetted in the purchase, and that all Davis did

2 was to afford the defendant an opportunity to do so, then
3 you will find that defendant guilty, if the government has
4 proven beyond a reasonable doubt the other elements of the
5 crime that I have reviewed with you.

6 Do you understand that charge? All right.

7 Now, the next one you want to know is a
8 definition of intent to distribute. Now, in my charge I
9 said to you:

10 Now, turning to what "possess with intent to
11 distribute" means. What does that mean? Well, intent to
12 distribute merely means that you intend at some point at
13 a later time to pass all or some of it on. It could mean
14 a sale; it could mean that you could give it away. You
15 could give it to a friend of yours or even to your
16 fiancee. If you are going to do that, that is a dis-
17 tribution.

18 And then (c) clarification of following -- then
19 you put in a question here. I am going to leave it with
20 what I told you distribution means. I think that is your
21 problem, to find that out.

Finally, you say in this message, "Can we get some cigarettes?" I want you to speak to the marshal and he will get them for you.

25 The second note says, "Please clarify the charges

2 against Maritza Des Los Santos."

3 I told you in the course of my charge here the
4 defendants in their testimony indicate that somebody placed
5 the cocaine in Miss De Los Santos' pocketbook. I think the
6 other testimony by Davis was that Swiderski had placed it
7 in his pants pocket. I went on to say you may ask your-
8 selves what did Miss De Los Santos have to do with it, if
9 anything? Her defense is she had nothing to do with it.
10 She was just there. As I recall the testimony, all of
11 the negotiations were carried on by Mr. Swiderski, and
12 you may ask yourselves why is Miss De Los Santos involved
13 at all. Well, here the government is contending that Miss
14 De Los Santos aided and abetted Swiderski in effecting the
15 purchase of the cocaine, and this brings into play another
16 statute, Section 2 (a) of Title 18 of the United States Code,
17 which provides in relevant part that whoever commits an
18 offense against the United States or aids, abets, counsels,
19 commands, induces or procures its commission is punishable
20 as a principal.

21 All that means is that if one helps somebody
22 else to commit a crime, that person is equally liable as
23 an aider and abettor in that crime, and the government here
24 contends that the evidence shows that at the apartment on
25 48th Street Miss De Los Santos did aid and abet her fiance

2 in buying the cocaine. But here before you can find Miss
3 De Los Santos guilty of aiding and abetting, the govern-
4 ment must prove beyond a reasonable doubt that she
5 knowingly aided, abetted and assisted Swiderski in purchas-
6 ing the cocaine. Now, it is immaterial that they were
7 fiancees and it is not enough that Miss De Los Santos may
8 have acquiesced in what was going on. Mere presence there
9 would not be sufficient to find that she was aiding and
10 abetting Swiderski.

11 Here to find Miss Des Los Santos guilty you must
12 find that she knowingly and willingly participated in the
13 transaction, that she sought in some way to gain from her
14 participation, or that she had an interest in the outcome.
15 The interest could be financial, it could be a relation-
16 ship between two people; it doesn't matter what the
17 interest is; did she want to help Swiderski, and here
18 you can consider what happened.

19 I think there was evidence about the testing,
20 the bleach test, and all that kind of thing that went on.
21 So consider that evidence and find out whether the
22 government has proved beyond a reasonable doubt that Miss
23 De Los Santos did aid and abet Swiderski in the purchase
24 of the cocaine on that day.

25 Does that give you the answers to your questions?

2 All right.

3 Do tell the marshal that you do want some
4 cigarettes. If not, we will have to get them some other
5 way.6 THE FOREMAN: Are there two charges against
7 Maritza or one?8 THE COURT: Only one, the same charge. Hers is
9 aiding and abetting, and that is one charge-- aiding and
10 abetting is the crime, if you find it so. Ask yourselves
11 that question.

12 Thank you very much.

13 (At 2:15 p.m. the jury retired to continue its
14 deliberations.)15 MR. WASSERSTEIN: Your Honor, could I except to
16 your Honor's charge on the following basis --

17 THE COURT: Which one?

18 MR. WASSERSTEIN: I will start from the last,
19 with respect to the clarification of aiding and abetting,
20 or the charges against Maritza De Los Santos. I think
21 it was necessary to make clear to the jury that before they
22 can reach the aiding and abetting statute, they must find
23 the principal actually guilty, and that it is not a
24 separate and distinct charge.

25 THE COURT: I was trying to help you out. Go ahead.

2 MR. WASSERSTEIN: Your Honor, I would also except
3 to your Honor's alluding to the evidence of Martin Davis'
4 testimony as opposed to any other testimony with respect to
5 aiding and abetting.

6 And with intent to distribute, I would have the
7 same exceptions as stated before.

8 MR. LIPSON: Your Honor, I would have nothing to
9 add to the remarks I made in the robing room, other than I
10 would except to your Honor's reference to negotiations by
11 Walter Swiderski due to the fact that all we really had is
12 Martin Davis' allegations.

13 THE COURT: You have an exception to that.

14 Thank you, gentlemen.

15 (At 4 o'clock p.m. the jury took its place in the
16 jurybox, and the roll of the jury was called by the
17 clerk.)

18 THE CLERK: Mr. Foreman, has the jury reached a
19 verdict?

20 THE FOREMAN: Yes, it has.

21 THE CLERK: How do you find against the defendant
22 Walted Swiderski?

23 THE FOREMAN: We find him guilty as charged.

24 THE CLERK: Against the defendant Maritza De Los
25 Santos?

CERTIFICATE OF SERVICE

Nov 24 , 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Jonathan Silberman